

Electronic Mortgage Closings Improve Homebuying: Part 1

By Eamonn Moran

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The financial services industry — and the consumer financial services marketplace in particular — is experiencing significant innovation. Technology has facilitated the emergence of fintech as a major industry — fundamentally changing virtually every aspect of the financial services landscape.[2] The emergence of more efficient technologies and novel approaches is enabling new services and transforming how payments and lending are conducted. With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act[3] and the formation of the Consumer Financial Protection Bureau, the regulation of consumer financial products, markets and services has increased significantly. Financial institutions, as well as nonbank providers of consumer financial products and services, have become subject to new regulations and laws, face higher levels of scrutiny and operate in an environment of elevated risk of enforcement proceedings. This environment, coupled with the increased complexity of financial products and services and the need to improve profitability and streamline processes, has created a tremendous appetite for financial institutions and financial services participants to deploy a growing range of innovative finance-related software and initiatives. This rise brings with it the promise and opportunity for certain parts of the consumer finance marketplace to benefit from greater efficiency. This is especially the case for mortgage loans, where the sheer number and complexity of documents in a single transaction can be challenging and burdensome.



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This article provides an overview of electronic mortgage closings (“eClosings”)[4] and the work the bureau has done on this front to date, and offers some reflections on the compliance risks associated with increased eClosing adoption as well as the hurdles and uncertainties that would need to be addressed before a fully electronic mortgage closing process could become a sustainable solution and see widespread industry adoption. Although electronic closing solutions have existed since before the financial crisis, when various mortgage industry players started to examine and develop eClosing solutions (and a few lenders implemented full eClosing solutions), more widespread adoption slowed when the financial crisis hit. In addition to legal and coordination and operational barriers to adopting a paperless process that the CFPB has identified, this article makes the case that there are also potential compliance risks and issues associated with this process. These include risks relating to unfair, deceptive and abusive acts and practices (UDAPs/UDAAPs), vendor management, data security and privacy, and the limited coverage of the bureau’s TRID mortgage disclosure rule. Moreover, it may not be possible to achieve the goal of a fully paperless mortgage process, since the mortgage closing also includes a critical element: the transfer and recording of the deed — a paper-centric process that varies state by state and

even county by county. While moving mortgage closings to an electronic (or increasingly electronic) format will not, by itself, resolve all the challenges associated with the closing process, it may have the potential to improve the closing process for all parties involved, not just consumers. However, until the issues identified above are resolved or at least mitigated, a hybrid process may be the most sustainable and achievable goal.

Background

With almost 10 million mortgages closed each year, the American mortgage market is the largest consumer financial market in the world. For most consumers, buying a home constitutes the largest financial transaction of their lives, and consequently is one of the biggest financial decisions most people will make during the course of their lifetimes. One important part of a mortgage transaction is the closing process, which represents the last step before a consumer is contractually obligated to their loan.

The CFPB's "Know Before You Owe" mortgage initiative,[5] which the bureau states is designed to help consumers understand their loan options, shop for the mortgage that is best for them, and avoid costly surprises at the closing table, extends beyond rulemaking. Due to the significance of mortgage closings and the sheer volume of information conveyed to consumers during closing, the bureau has focused on the closing process as one piece of its broader efforts surrounding mortgage simplification.[6] The CFPB has concluded that this process is currently not working as well as it could for consumers or industry. Based on its initial research, the bureau believes that there may be opportunities to leverage technology to improve the mortgage closing process. Specifically, the bureau has hypothesized that technology-enabled electronic closing solutions "have the potential to reduce errors, limit surprises, lessen anxiety, and create more time and opportunity for consumers to understand their mortgage and make more informed decisions." [7]

The "closing" is the last step in buying and financing a home. It follows the following steps in the origination process: (i) the initial application — the collection and processing of information associated with the mortgage application; (ii) information processing — credit check, flood determination, fraud detection report, verification of employment; (iii) valuation — establishes value of the property based on expert opinion; (iv) underwriting — assessment of borrower's eligibility for mortgage; and (v) title — established title chain of custody to ensure no potential conflict on ownership. The closing, also referred to as the settlement, is when the borrower and all the other parties in a mortgage loan transaction sign the necessary documents. After signing these documents, the borrower becomes responsible for the mortgage loan. If a borrower purchases a home with a loan, the closing of his or her loan (the time when the loan becomes final and the funds are distributed) and the closing of his or her home purchase (when the borrower becomes the owner of the home) typically happen at the same time. Once the closing is complete, the borrower is legally required to repay the mortgage.

The closing may include some or all of these entities: (i) title insurance company; (ii) escrow company; (iii) lender; (iv) buyer's attorney (if the borrower resides in a state where attorneys conduct closings, or if the borrower hires legal representation for the closing); and (v) seller's attorney. Depending on what state the borrower resides in, all the parties may sit around a table and sign all the documents at once, or the closing could take several weeks as the signatures of each party are collected separately. Some companies allow the borrower to electronically sign documents, either in advance of closing or at the closing table. A closing may even be conducted by mail or even online.

The closing process for residential real estate consists of two key phases when the buyer obtains

financing. First, the legal transfer of property ownership occurs through conveyance and recording of the deed. The deed is the legal document that represents ownership of property; transfer of the deed signifies transfer of the real property. At closing, the seller of real property turns the deed over to the buyer — a process that completes the transfer and hands legal title of the property to the buyer. Each county in the U.S. has a land records system. Typically, the county clerk, recorder or register maintains the property records database and records new filings, which include book and page systems or document numbering systems. Particular real estate documents, such as deeds, mortgages and liens, are deemed recordable.

Second, the buyer receives federally mandated documents, contractual documents, state- and local-mandated documents, and lender documents related to the mortgage loan. The federally mandated documents inform the borrower of the key terms, provisions and costs of his or her loan. They outline the borrower's key rights and responsibilities and record the transaction between the borrower and the lender.[8] Contractual documents include the promissory note,[9] which describes what the borrower is agreeing to, and a mortgage or security instrument, which explains the borrower's rights and responsibilities. State and local government-mandated documents fulfill state and local government requirements, generally for the purpose of collecting information and protecting the borrower, such as a septic system disclosure in the Commonwealth of Massachusetts. Lender documents are documents added by the lender, for example, an occupancy affidavit. Key differentiators determine which borrower documents are in a particular closing package, including loan, property, borrower, and lender attributes.[10] According to the CFPB's research, two of the largest contributors to the variability of forms (based on the number of potential additional forms and percentage of mortgages affected) are (1) the state in which the property is located, and (2) FHA or VA loans.[11]

As part of its "Know Before You Owe" mortgage initiative, the CFPB published a report[12] in April 2014 which found that many consumers are frustrated by the short amount of time they have to review a large stack of complex closing documents when finalizing a mortgage. The report identified three major pain points for consumers during the closing process: (i) frustration with the short amount of time they have to review the closing documents; (ii) the sheer volume of paperwork consumers face when closing on a home; and (iii) the complexity of closing documents and errors in closing documents.

Among potential solutions to improve the consumer experience, the CFPB chose to explore two in depth: (1) the use of technology in closings (eClosings); and (2) the reduction and simplification of the closing package. The bureau's research found that other stakeholders own or regulate most closing documents, thereby limiting opportunities for the CFPB to reduce the size of the closing package. Given the CFPB's limited jurisdiction with respect to closing documents, the bureau has focused its efforts on studying eClosings. There are various ways that lenders offer eClosing to their consumers, ranging from electronic documents to fully integrated mortgage closing portals and beyond.

The bureau also released guidelines[13] for an eClosing pilot project to assess how electronic closings can benefit consumers as they navigate the mortgage closing process. According to the bureau, this pilot program was designed to "source new information in order to evaluate the role of current solutions and potentially help spur innovations in the mortgage closing process," rather than to create additional mortgage rules. In August 2014, the CFPB announced the selection of participants for its mortgage eClosing pilot program.[14] The three-month pilot explored how the increased use of technology during the mortgage closing process could affect consumer understanding and engagement and save time and money for consumers, lenders and other market participants. The companies participating in the pilot were a mix of technology vendors providing eClosing solutions, and creditors that have contracted to close loans using those solutions. All tests during the pilot utilized the HUD-1 and truth-in-lending (TIL)

federal disclosures, since institutions were not authorized to use the closing disclosure until it became effective in October 2015.

In August 2015, the CFPB released the results of that pilot in a report,[15] which revealed some important initial insights about how eClosing can influence a consumer's home-buying experience and can offer a promising option for consumers. Notably, the CFPB found that eClosing borrowers in the pilot scored higher than paper borrowers on the CFPB's measures of empowerment at closing, perceived understanding, and efficiency. Another critical finding in the pilot analysis was that, often, the consumers who showed the best results according to the CFPB's metrics were those who received and reviewed their closing documents before the closing meeting. Early document delivery and review were associated with better measured outcomes in both paper and eClosing transactions, but the early delivery of documents occurred much more consistently in the eClosings the CFPB analyzed during the study. Similarly, those who accessed CFPB educational materials saw gains in the outcomes that the CFPB measured. It appears that both early document review and educational materials can play a role in helping consumers to better understand their closing documents and the process. The timing requirements of the TRID rule will help accomplish that goal. However, the information that this pilot yielded is not sufficient to draw definitive conclusions, and additional research is needed to gather more information and further validate some of these initial findings.

In October 2015, the CFPB's TILA-RESPA Integrated Disclosure ("TRID") Rule became effective, which marked the beginning – for most mortgages – of integrated disclosures under the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA), as contained in the new Loan Estimate and Closing Disclosure forms.[16] While the TRID rule addresses some of these challenges (e.g., consumers receive their Closing Disclosure at least three business days in advance of closing, to provide more time to review the terms of the deal), the rule does not apply to any of the other paperwork consumers receive at the closing table, as the CFPB only has jurisdiction over a few forms in the closing stack.

Electronic Mortgage Closings Improve Homebuying: Part 2

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In the first part of this article, we shared an overview of electronic mortgage closings and the work the Consumer Financial Protection Bureau has done on this front to date. Here, in the second and final part of the article, we reflect on the compliance risks associated with increased e-closing adoption as well as the hurdles and uncertainties that would need to be addressed before a fully electronic mortgage closing process could become a sustainable solution and see widespread industry adoption.

Potential Barriers to Adoption and Key Compliance Considerations

In its April 2014 report, the Consumer Financial Protection Bureau outlined several specific legal barriers to adopting a paperless process that the CFPB believes to be most noteworthy.[1] First, the bureau noted that different state laws and requirements, including the legal framework that states have adopted around e-signatures (e.g., states have different regulations around electronically enabled notarization and are at different points of implementation) create complexity and confusion. Second, the bureau observed that although certain laws such as the Electronic Signatures in Global and National Commerce Act (ESIGN) and the Uniform Electronic Transactions Act (UETA) clearly articulate the legality of electronic signatures,[2] some industry players still believe that e-signatures are not fully legal in their state, and may not understand the legal framework surrounding e-signatures. Some industry

stakeholders also are concerned about the defensibility of e-signatures — most especially on the note and the security instrument — in cases where there is uncertainty as to whether the original closing followed proper procedures (e.g., obtaining consumer consent consistent with applicable legal requirements). Third, the bureau found that the government-sponsored entities (GSEs), which include Fannie Mae and Freddie Mac, have separate requirements for the sale and delivery of electronically signed mortgages, and each of the GSEs also has different requirements for transferring the location and control of e-notes, which is critical to the resolution of foreclosure proceedings.[3]

The bureau also identified several coordination and operational barriers, including the lack of mortgage data standardization across the industry, required coordination across various players involved in the mortgage closing, limitations to expansion of e-recording, and the time and cost required to transition processes and policies (recognizing the likely need to maintain paper processes for customers not comfortable with an electronic process or who lack access to the necessary technology).[4]

In addition to the barriers[5] identified by the bureau, companies already offering or interested in exploring electronic closing technologies should be aware of the following potential compliance risks and issues detailed below.

UDAP/UDAAP Risks

Section 5 of the Federal Trade Commission Act declares that unfair and deceptive acts and practices (UDAPs) affecting commerce are illegal.[6] Since 1938, the Federal Trade Commission has had authority to enforce the prohibition of “unfair or deceptive acts or practices.” The banking agencies[7] have authority to enforce Section 5 of the FTC act for the institutions they supervise. If a UDAP involves an entity or entities over which more than one agency has enforcement authority such as, for example, the Federal Deposit Insurance Corporation and the FTC, the agencies may coordinate their enforcement actions. Under the Dodd-Frank Act, the CFPB has authority to enforce the prohibition against covered persons or service providers from committing unfair, deceptive or abusive acts or practices (collectively, UDAAPs).[8] The bureau also has authority to write rules identifying certain UDAAPs in connection with any transaction with a consumer for a consumer financial product or service, or the offering of such a product or service, and such rules may include requirements for the purpose of preventing such acts or practices.[9]

In particular, the CFPB has used its authority to target UDAAPs in innovative ways, including use of the UDAAP authority to target practices that might not clearly be illegal under the strict letter of the law.[10] As you can imagine, this presents a big compliance challenge, as it appears that companies need to build a compliance system around legal requirements that are not always clearly written into law. In its recently issued recommendations for regulatory reform in the financial services sector, the Trump administration explicitly addressed this issue.[11] First, the administration believes that the CFPB should be required to issue rules or guidance subject to public notice and comment procedures before bringing enforcement actions in areas where clear guidance is lacking or where the agency’s position departs from the historical interpretation of the law (a position which seems based on the administration’s views of the CFPB’s posture in the PHH case). This recommendation is also rooted in the premise that the CFPB should seek monetary sanctions only in cases where a regulated party had reasonable notice — under a CFPB regulation, judicial precedent or FTC precedent — and that its conduct was unlawful.[12] Second, the administration calls for the CFPB to adopt regulations that more clearly articulate its interpretation of the UDAAP standard. If the CFPB concludes a new practice is problematic in the broader market, it should conduct notice and comment rulemaking to prohibit the practice, rather than continuing to rely on case-by-case enforcement to develop the UDAAP standard.

Electronic closings carry certain risks that do not exist in the traditional paper process, including increased regulatory scrutiny of acts or practices that could cause significant financial injury to consumers, erode consumer confidence and undermine the financial marketplace. Along with the lender's process and protocols for obtaining consumer consent for e-signatures, companies would need to be particularly focused on the content, presentation and format of all electronic materials, including technology issues and consumer interface and usability issues, such as unclear directions, confusing or ambiguous language, or distorted formatting on computer screens. Additionally, early and continuous training of all stakeholders would be critical to help ensure a successful rollout and consistency across the various actors, especially as it relates to communications with the borrower and borrower understanding.

Vendor Management

Due to the number of parties involved in the mortgage closing transaction, a lender interested in implementing e-closing solutions needs to coordinate effectively with many other participants in the process, including technology vendors, settlement agents and closing attorneys, among others. The bureau's pilot study found that clear expectations and consistent communication between all parties involved — lenders, vendors and their associated partners — was necessary for a successful pilot collaboration. Furthermore, as the bureau notes, the relationship between the lender and technology provider(s) was consistently discussed as one of the largest determinants of success in the pilot study. Clearly established roles and responsibilities between the lender, technology providers, document providers (who play an important role in creating the e-closing infrastructure), and the settlement agents who conduct the closings would be essential to a successful and sustainable e-closing solution. Some pilot participants also highlighted the value of regular check-in meetings between the lender and the vendor. Heightened regulatory scrutiny of the vendor management practices of financial institutions has resulted in several public enforcement actions based on violations of consumer protection and other laws by bank service providers. Regulators are also placing heightened scrutiny on financial institutions' management of vendor relationships. In light of these regulatory developments, financial institutions have continued to refine their vendor management programs and are imposing stricter diligence and contractual requirements on their service providers. Risk management approaches should be tailored to each vendor relationship, with a focus on including a planning stage, appropriate diligence, an appropriate contract and appropriate monitoring. The CFPB already has voiced concern that, in the mortgage servicing context, ongoing technology failures and malfunctions trigger rule violations.[13] The potential for similar issues also exists in the mortgage origination context, especially with respect to TRID compliance and its various deadlines and disclosure components.

Lenders should also understand the implications for sales to the GSEs and secondary market. For example, Fannie Mae neither endorses technology vendors, nor establishes compliance checks for vendor systems, including correspondents and third-party originators systems. Accordingly, lenders should exercise care in selecting a vendor system that fits their needs and adheres to the GSEs' representation and warranty framework and selling guidelines.

Data Security and Privacy

Electronic closing solutions pose increased risks to document security since consumer information could be hacked. We live in an age where industry is very sensitive to data breach incident preparation, response and recovery. As recent events have shown, data breaches trigger state, federal and international breach notification requirements, SEC and other regulatory obligations, contractual

reviews, litigation exposure, liaison with government agencies, media inquiries and compliance improvement efforts. In response to serious breaches, companies often conduct internal investigations and engage outside forensic experts. There also are many statutes, rules and industry self-regulatory programs that govern privacy and consumer protection in the online ecosystem. These include the Gramm-Leach-Bliley Act, Fair Credit Reporting Act, Fair and Accurate Credit Transactions Act, Right to Financial Privacy Act, their implementing regulations and numerous state requirements. Financial privacy compliance is a critical concern in the mortgage market since many of the closing documents typically contain personally identifiable information (PII), which creates an enhanced need for appropriate platform and data security protocols.[14] While the bureau ensured that the pilot participants used technology platforms that met industry standards for privacy and cybersecurity, pilot borrower perceptions in the e-closing group expressed more reservations as to whether the process for signing the documents felt secure than did the pilot borrowers in the paper closing group. Technology glitches in an e-closing may cause security concerns and lead to reduced consumer confidence, especially if encryption methods are not fully transparent. Future e-closing providers throughout the industry should ensure that platform security is easy to understand and clearly explained to borrowers.

The CFPB is the most recent addition to a broad array of federal regulators monitoring, overseeing and enforcing data security, including the FTC and the federal banking agencies. Although there is no explicit statutory authority in the Dodd-Frank Act directing the CFPB to regulate data security (minus the UDAP authority that authorizes the bureau to participate in data security supervision, rulemaking and enforcement),[15] the CFPB entered the data security space last year by issuing its first UDAP enforcement action against a small payments company for allegedly deceptive statements about data security practices.[16] The nature and substance of this enforcement action indicate that the bureau expects regulated companies to put systems in place to adequately protect sensitive personal information and accurately inform consumers about their data security practices. The CFPB also hints that additional enforcement action in the area of data security may follow. Yet in the absence of formal rulemaking or other guidance from the CFPB, companies are hard pressed to determine the specific data security practices they are expected to follow.

Limited Coverage of TRID

A critical finding in the bureau's pilot study was that, often, the consumers who showed the best results according to the CFPB's metrics were those who received and reviewed their closing documents before the closing meeting. However, while the TRID rule applies to most closed-end consumer mortgages, it does not apply to home equity lines of credit (HELOCs), reverse mortgages or mortgages secured by a mobile home or by a dwelling that is not attached to real property (i.e., land).[17] The rule also does not apply to loans made by a creditor who makes five or fewer mortgages in a year. This means that the integrated disclosures are not being used to disclose information about reverse mortgages, HELOCs, chattel-dwelling loans or other transactions not covered by the TRID rule. Creditors originating these types of mortgages must use, as applicable, the GFE, HUD-1 and TIL disclosures. Accordingly, not all consumers in a mortgage transaction will receive the benefit of receiving and reviewing the closing disclosure several days before closing.

Hybrid Process

Finally, it remains unclear whether a fully electronic e-closing process could be implemented, at least on a broad scale. None of the pilot participants completed a 100 percent paperless closing; they all had borrowers sign at least one document for various reasons. The barriers to implementing e-closing more broadly in the mortgage market seem largely associated with a few documents that need to be recorded

or notarized, and many closings occur on any combination of paper and electronic. Accordingly, a hybrid process where some documents are signed electronically and some are signed with ink could eliminate some of the key obstacles to implementing an e-closing solution. A hybrid process also would accommodate and allow for transfer and recording of the deed, which remains a somewhat antiquated and paper-centric process that varies state by state and even county by county. It was encouraging to learn that just recently, Equity National Title announced that it is now able to deliver hybrid e-closings in which select documents, such as the deed and note, are printed and “wet-signed,” but much of the closing package is executed electronically. Equity National Title is using Pavaso’s Digital Close, which accommodates paper, hybrid or fully electronic closings. The electronic closing platform provides built-in e-sign and e-notarization capabilities, allowing borrowers to sign and notaries to verify and stamp documents digitally. Although there are still some traditionally wet-signed documents, this allows the majority of the closing package to be executed more efficiently and securely. It also enables efficient online communication and collaboration between the real estate agent, lender, title/settlement agent and borrower during the entire closing process. As the digital transformation of the mortgage closing becomes more widespread and mainstream as the title network for digital mortgages expands, additional data collection concerning electronic closing platforms would be instrumental to help determine and assess their effectiveness and viability.

Conclusion

While technology, including electronic closing technologies commonly known as e-closing, may offer some promise and potential to simplify the closing process and empower consumers with better organized information, more time to review that information, and the ability to embed educational resources, there are potential risks. Adoption of e-closing remains relatively low across the mortgage market. It is a positive sign that, overall, participants relayed positive feedback from consumers and other stakeholders who completed the e-closing process, and the bureau remains optimistic about the future of e-closing in the mortgage market. There also appears to be a growing appetite among lenders for implementation of an increasingly digital closing experience. Yet, given the current process constraints and operational issues associated with title transfer and deed recordings, it is unclear whether a fully digital closing could see fruition. It has been over three years since the CFPB issued its first e-closing study. While the CFPB’s study offers promise that technology could be an important tool to break down a complex process into one that is easier to understand, manage and facilitate, much work and further study lies ahead. The bureau’s pilot and its findings have initiated the conversation. Further dialogue and analysis of the benefits, opportunities, and risks of e-closings within the context of the larger mortgage market are critical to ensuring that all voices are heard and that all critical risks and issues are identified and appropriately managed.

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[1] The term “fintech” refers to an economic industry composed of companies that use technology to

make financial services more efficient.

[2] Pub.L. 111–203, H.R. 4173.

[3] The term “eClosings” refers to mortgage closings that rely on technology that allows consumers and those involved with the mortgage transaction to view and sign documents electronically, and could also include hybrid eClosings, through which a portion of the closing documents are viewed or signed electronically while others are signed with ink on paper. The bureau does not include an electronically signed mortgage or “eNote” in its vision of eClosing.

[4] <http://www.consumerfinance.gov/know-before-you-owe/>.

[5] This initiative also includes the TRID mortgage disclosure rule, Your Home Loan Toolkit, educational online tools such as Owning a Home, and related reports on the home mortgage shopping experience.

[6] Consumer Financial Protection Bureau, “Mortgage closings today: A preliminary look at the role of technology in improving the closing process for consumers,” (April 2014) (CFPB April 2014 Report), available at http://files.consumerfinance.gov/f/201404_cfpb_report_mortgage-closings-today.pdf.

[7] Federally mandated documents include: the loan estimate (a form that lays out important information about the loan the borrower applied for, and which the lender sends the borrower a loan estimate within three business days of receiving the application); the closing disclosure (a form that lists all final terms of the loan the borrower has selected, final closing costs, and the details of who pays and who receives money at closing, and which lender sends the borrower at least three business days before closing); the notice of the right to rescind (provided if the loan is not used to purchase a home (e.g., a refinance or home equity line of credit), this notice informs the borrower that he or she has three business days from the lender’s fulfillment of certain conditions to cancel the loan and provides a form for cancelling the loan); and the initial escrow statement (which lists the estimated taxes, insurance premiums and other charges the lender anticipates paying from the borrower’s escrow account during the first year of the loan).

[8] The promissory note provides the borrower with details regarding the loan, including: (i) the amount the borrower owes; (ii) the interest rate of the mortgage loan; (iii) the dates when the payments are to be made; (iv) the total amount the borrower will pay; (v) the length of time for repayment; (vi) whether and how the payment amounts can change; and (vii) the place where the payments are to be sent.

[9] For example, loan attribute variables may include whether the loan is: purchase or refinance; conventional, Federal Housing Administration (FHA) or Department of Veterans’ Affairs (VA); and fixed-rate or ARM. Property attribute variables may include the property state, the property type, and whether the property is the borrower’s primary residence or non-owned-occupied. Borrower attribute variables may include whether: there is a coborrower; a first-time homebuyer; or trust. Lender attribute variables may include whether the lender is national or state-chartered, and the lender’s use of discretionary forms.

[10] CFPB April 2014 Report.

[11] *Id.*

[12] Consumer Financial Protection Bureau, “eClosing Pilot Guidelines: Guidelines for participating in

CFPB EClosing Pilot,” available at http://files.consumerfinance.gov/f/201404_cfpb_guidelines_eclosing-pilot.pdf.

[13] Consumer Financial Protection Bureau, “CFPB Announces Mortgage EClosing Pilot Participants,” (August 21, 2014), available at <http://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-mortgage-eclosing-pilot-participants/>. The companies that participated in the pilot were a mix of technology vendors providing eClosing solutions, and creditors that have contracted to close loans using those solutions. The participants included the following vendors: Accenture Mortgage Cadence; DocMagic Inc.; eLynx; Pavaso Inc.; and PiersonPatterson LLP; and the following creditors: Blanco National Bank; Boeing Employees Credit Union; Franklin First Financial Ltd.; Flagstar Bank; Mountain America Credit Union; Sierra Pacific Mortgage; and Universal American Mortgage Company.

[14] Consumer Financial Protection Bureau, “Leveraging technology to empower mortgage consumers at closing: Learnings from the eClosing pilot,” (August 2015) (CFPB August 2015 Report), available at http://files.consumerfinance.gov/f/201508_cfpb_leveraging-technology-to-empower-mortgage-consumers-at-closing.pdf. Due to a variety of operational and institutional reasons, the Bureau was not able to conduct a fully randomized controlled trial of treatment and control groups to test the influence of technology and eClosing on the consumer experience. Additionally, the borrowers in the pilot sample were not representative of the national population completing mortgage closings. Finally, the overall sample size of the study was too small for the bureau to be able to detect statistical significance between groups for nearly all variables included in the pilot.

[15] In July 2017, the CFPB finalized certain amendments to the TRID rule. The amendments memorialize past informal guidance, whether provided through webinar, compliance guide or otherwise, and make additional clarifications and technical amendments. These amendments also make a limited number of additional substantive changes, where the bureau has identified discrete solutions to specific implementation challenges. The bureau also issued a limited follow-up proposal to address a discrete implementation issue. See Consumer Financial Protection Bureau, Amendments to Federal Mortgage Disclosure Requirements under the Truth in Lending Act (Regulation Z) (July 7, 2017), available at http://files.consumerfinance.gov/f/documents/201707_cfpb_Final-Rule_Amendments-to-Federal-Mortgage-Disclosure-Requirements_TILA.pdf.

[1] CFPB April 2014 Report.

[2] Also, 47 states, the District of Columbia, and the U.S. Virgin Islands, have adopted laws based on the UETA, a model for state statutes that was made available in 1999 by the National Conference of Commissioners on Uniform State Laws. The remaining three states (Illinois, New York and Washington) each have their own statutes to address electronic signatures.

[3] We note that since this report, the GSEs appear to have modified their e-closing and e-mortgage requirements to assist seller/servicer adoption efforts. Fannie Mae accepts e-signatures on all closing documents. Only lenders seeking to originate and deliver e-notes to Fannie Mae must seek prior approval. Fannie Mae actively purchases e-mortgages that meet its published guidelines — through both whole loans and MBS executions. In March 2017, Fannie Mae announced that it has selected eOriginal Inc. as its technology solution provider for the Fannie Mae next generation electronic vault (eVault) eOriginal’s hosted platform enables the secure management of e-notes throughout their post-execution lifecycle. In addition to investing in new eVault infrastructure, Fannie Mae also is simplifying e-mortgage adoption by transitioning to the MISMO SMART Doc™ Version 3.0 format in 2017, which will help facilitate the lending industry’s ability to originate and deliver e-mortgages. Freddie Mac has been

accepting electronic loan documents and e-mortgages since 2005, and the security instrument and other loan documents can be paper or electronic records. Seller/servicers must receive Freddie Mac approval of their e-closing and e-note systems before they can sell e-mortgages to and/or service e-mortgages for Freddie Mac. As part of the approval process, the seller/servicer's systems used to originate and close e-mortgages and store electronic notes are reviewed.

[20] CFPB April 2014 Report.

[21] The bureau believes that while some of these barriers apply to all e-closing solutions, most are only obstacles to a "fully paperless" process closing in which the consumer electronically signs all documents.

[22] 15 U.S.C. § 45(a).

[23] In August 2014, the FDIC, FRB, CFPB, the National Credit Union Administration (NCUA), and the Office of the Comptroller of the Currency (OCC) issued guidance regarding certain consumer credit practices as they relate to Section 5 of the FTC act. The authority to issue credit practices rules under Section 5 of the FTC act (e.g., Regulation AA, Credit Practices Rule) for banks, savings associations and federal credit unions was repealed as a consequence of the Dodd-Frank Act. Notwithstanding the repeal of such authority, the guidance indicated that the agencies continue to have supervisory and enforcement authority regarding unfair or deceptive acts or practices, which could include those practices previously addressed in the former credit practices rules.

[24] 12 U.S.C. § 5531(a). We also note that under certain circumstances, the Dodd-Frank Act authorizes state attorneys general and regulators to commence civil actions to enforce provisions of the Consumer Financial Protection Act or regulations issued under such law, including the UDAAP prohibition. See 12 U.S.C. § 5552.

[25] 12 U.S.C. § 5531(b).

[26] One example of this is the Flagstar enforcement action. This was the first enforcement taken to enforce the new servicing rules. Those servicing rules went into effect at the beginning of 2014. But the CFPB's action covered conduct occurring even before that effective date under the theory that those pre-effective date practices were either unfair or deceptive. See *In the Matter of Flagstar Bank*, F.S.B., File No. 2014-CFPB-0014 (Sept. 29, 2014). Another example is in the debt collection space, where the CFPB has used its enforcement authority to target first-party debt collection practices even though the FDCPA applies according to its terms just to third-party debt collection practices.

[27] U.S. Department of the Treasury, *A Financial System that Creates Economic Opportunities: Banks and Credit Unions*, June 2017, available at <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf>.

[28] The Trump administration notes that this reform "would not deprive the CFPB of the ability to target and stop practices not previously understood to be prohibited, as the agency would retain the authority to issue a cease-and-desist order or initiate an enforcement action seeking injunctive relief."

[29] See Consumer Financial Protection Bureau, *Supervisory Highlights Mortgage Servicing Special Edition (Issue 11)* (June 22, 2016), available at <http://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/supervisory-highlights-mortgage-servicing-special-edition-issue-11i>.

[30] The Gramm-Leach-Bliley Act (GLBA) and its implementing regulation (Regulation P) generally prohibit financial institutions from disclosing nonpublic personal information about a consumer to nonaffiliated third parties unless (1) the institution satisfies various notice and opt-out requirements and (2) the consumer has not elected to opt out of the disclosure. Financial institutions are also required to provide notice of their privacy policies and practices to their customers. 15 U.S.C. §§6801–6809; 12 C.F.R. Part 1016. In addition to opt-out rights under the GLBA, annual privacy notices also may include information about certain consumer opt-out rights under the Fair Credit Reporting Act (FCRA).

[31] Questions have been raised about the scope of the CFPB's jurisdiction in this area. See, e.g., Michael Gordon, Elijah Alper and Leah Schloss, The CFPB and Data Security Enforcement, BNA's Banking Report (Vol. 106, No. 23, June 6, 2016); Jonathan G. Cedarbaum & Elijah Alper, The Consumer Financial Protection Bureau as a Privacy & Data Security Regulator, 17 FinTech Law Report (May/June 2014).

[32] In the Matter of Dwolla Inc., File No. 2016-CFPB-0007 (March 3, 2016).

[33] In July 2016, the CFPB proposed to amend the TRID rule to require provision of the integrated disclosures in transactions involving cooperative units, whether or not cooperatives are classified under state law as real property. Cooperatives are sometimes treated as personal property under state law and sometimes as real property. The bureau finalized such amendments in July 2017. See Consumer Financial Protection Bureau, Amendments to Federal Mortgage Disclosure Requirements under the Truth in Lending Act (Regulation Z) (July 7, 2017), available at http://files.consumerfinance.gov/f/documents/201707_cfpb_Final-Rule_Amendments-to-Federal-Mortgage-Disclosure-Requirements_TILA.pdf.